No. 12,784

IN THE

United States Court of Appeals

For the Ninth Circuit

HUNG CHIN CHING,
Appellant,

vs.

FOOK HING TONG, CHONG HING TENN and KUI HING TENN,
Appellees.

Upon Appeal from the Supreme Court of Hawaii.

REPLY BRIEF FOR APPELLANT.

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Subject Index

Argument:	Page
I. Appellees' reply brief does not dispute proposition of law advanced in Argument I of appellant's opening brief	1
II. Cases cited by appellees to meet appellant's Argument II in opening brief may be differentiated	3
III. Argument III of appellant's opening brief is not "Quibbling"	4
IV. Appellees failed to answer most important point in Argument IV of appellant's opening brief	5
V. Appellant was not guilty of laches	5
VI. This court may review and reverse decisions of Supreme Court of Hawaii as to law and to facts in this case	6
Conclusion	9

Table of Authorities Cited

Cases

	Pages
Ah Lung v. Ah Leong (1928, CCA 9), 27 F. (2d) 582	8
Barnes v. Collins, 16 Haw. 340	8
Bird v. Hamilton, Walker's Chancery (Mich. 1844), 361	3
Chun Ngit Ngan v. Prudential Insurance Co. (1925, CCA 9), 9 F. (2d) 340	8
Ex parte Duncan (CCA 9), 146 F. (2d) 576	6
H. Johnson v. T. P. Tinsdale, 4 Haw. 605	5
Waialua Agricultural Co. v. Christian, 305 U. S. 91	7, 8

Codes

Judicial Code, Sections 1293 and 1294 (5), Title 28 U.S.C.A.	8

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ARGUMENT.

I.

APPELLEES' REPLY BRIEF DOES NOT DISPUTE PROPOSITION OF LAW ADVANCED IN ARGUMENT I OF APPELLANT'S OPENING BRIEF.

Argument I of appellant's opening brief, pages 15 to 32, advanced a proposition of law that fiduciary relationship exists when parties agree to form a partnership. (Op. Br. 16-17.) Appellees in their brief do not dispute it. But appellees seem to brush aside appellant's entire Argument I in a short paragraph on page 20 of their brief referring to R. 270, 328, 332, 339, 340. Reference is hereby made to

pages 19 to 33 inclusive of appellant's opening brief. The argument of the appellant in those pages remains unanswered.

As for the evidence of demand there is no dispute that appellee, Chong Hing Tenn, took care of the legal matters and finances. There is no evidence whatsoever that Chong Hing Tenn ever made demand upon the appellant. The only two instances of any demand by Chong Hing Tenn appear on pages 168 and 244 of the transcript. Reference to these pages are made on page 20 of the appellees' brief. The above mentioned testimony carefully examined fails to show a demand by Chong Hing Tenn on the appellant. It must be remembered that Fook Hing Tong was on Maui and appellant had to deal with Chong Hing Tenn who worked with appellant in the restaurant and *who was in charge of finances.* There was duty on Chong Hing Tenn to make a direct demand on the appellant—he never did this.

As submitted in page 65 of appellant's opening brief the letter from Fook Hing Tong to appellant stating "you have three, that is if you get the dong by then" meant it was to be paid when Chong Hing Tenn who was in charge of finances made demand. All of the other instances of demand by Fook Hing Tenn referred to by the appellees on page 20 of their brief are dubious demands after the appellant had been excluded from the partnership and furthermore after Fook Hing Tenn wrote to Ching on or about October 9th, 1941 to get out of the premises. This fact is referred to in appellant's opening brief pages 68 to 71 inclusive.

Therefore it is submitted that argument I of the appellant both on the law and facts remain clearly unanswered by appellees' reply brief. A reversal is therefore warranted on argument I of the appellant only, the law being admitted and the facts being as above indicated.

II.

CASES CITED BY APPELLEES TO MEET APPELLANT'S ARGUMENT II IN OPENING BRIEF MAY BE DIFFERENTIATED.

Argument II of the appellant's opening brief is met by appellees in pages 20 to 24 of their brief. Great emphasis is placed by the appellees in their brief on the intent of the parties. In *Barnes v. Collins,* 16 Haw. 340, it was held:

> "But by the intention of the parties is meant, not what they call or consider the relation into which they enter, but what the relation is in legal effect."

The cases cited by the appellees may be differentiated. The only close case cited is that of *Bird v. Hamilton,* Walker's Chancery (Mich. 1844), 361. It is interesting that the Court at the end of the decision remarked at page 373:

> "The present case is not, I confess, without its difficulties."

It is submitted that had there been present in that case evidence of double-crossing by a person in fiduciary capacity as displayed by Chong Hing Tenn is this case the Michigan Court would have reached a

contrary result. In all of the other cases cited by the appellees the element of breach of good faith by and between parties in fiduciary relationship was missing and in all cases, unequivocal demands were made.

III.

ARGUMENT III OF APPELLANT'S OPENING BRIEF IS NOT "QUIBBLING".

Appellees' statement on page 24 of their brief that the written and oral decisions were diametrically opposite certainly needs correction. The written decision is based on the defense of a lack of tender. It is submitted that the oral decision and the written decision are not diametrically opposite up to the point of tender. The written decision is silent as to appellant's being "squeezed out" but silence is not opposition.

Appellees refer to appellant's argument III as being childish—"puerile". Perhaps so because the fundamental error may be discovered by even a child. The cases cited by the appellant in support of his argument remain completely unanswered by the appellees. In other words the appellant's position is correct as far as the law is concerned. The judges in the decisions cited by the appellant thought it important to differentiate between fact findings and orders or judgments. Appellees seem to think differently.

IV.

APPELLEES FAILED TO ANSWER MOST IMPORTANT POINT IN ARGUMENT IV OF APPELLANT'S OPENING BRIEF.

Appellees do not dispute in their brief the correctness of the decision in *H. Johnson v. T. P. Tinsdale,* 4 Haw. 605, cited in appellant's argument IV to the effect that tender is unnecessary when it is reasonably certain that the offer will be refused. The admitted testimony of Dr. Tong (Fook Hing Tong) was that he kicked out appellant as of October 9th, 1941. Reference is hereby made to pages 68 to 71 of the appellant's opening brief.

Appellees are no doubt embarrassed by this testimony of Dr. Tong. Not even an attempt to explain the situation is made by the appellees in their reply brief.

Here again may it not be asked whether a failure on the appellees' part to reply to an obviously sound and fundamental point of law is an acknowledgment of the correctness of the appellant's position?

V.

APPELLANT WAS NOT GUILTY OF LACHES.

Appellees on page 27 of their reply brief state that the trial Court stated "Equity helps the vigilant, not those who sleep on their rights", and cite this to support their position that appellant did not promptly bring suit. The trial Court made that statement only with relation to the defense of tender. (See Tr. p. 48.)

Both of the lower Courts were hesitant to adopt the proposition advanced by the appellees in their brief that appellant should have started his suit sooner. In fact in the oral decision the trial Court held that there was no laches. (See Tr. p. 398.)

Appellees' counsel seem to forget that after December 7th, 1941 it was not until February 8th, 1943 that the Territorial Courts were released from Military Control. See *Ex parte Duncan* (9 C.C.A.) 146 F. (2d) 576 at page 581 for a full discussion of this factual matter. Appellant obtained counsel in October or November of 1943. (See Tr. p. 311.) In other words in spite of the war situation and in spite of the fact that he was a police officer with much to do during those war years he sought counsel in a fairly short time after the Courts were opened—in about seven months.

It is submitted that where neither the trial Court nor the Supreme Court of Hawaii found the appellant guilty of laches this Court should hesitate to do so especially where both of the lower Courts were well aware of conditions in Hawaii during the war years and they refused to find appellant guilty of laches.

VI.

THIS COURT MAY REVIEW AND REVERSE DECISIONS OF SUPREME COURT OF HAWAII AS TO LAW AND TO FACTS IN THIS CASE.

It is respectfully submitted that this Honorable Court may review and should reverse the decision of

the Supreme Court of Hawaii as to the law applicable in this case and also as to conclusion of facts reached from evidence presented.

Appellees contend in their brief (pages 13-15) that this Court should not overturn the findings of the Supreme Court of Hawaii as to applicable law and conclusions of facts and give as reason therefor the so-called "manifest error" rule and cite as authority for said rule the *Waialua Agricultural Co. v. Christian,* 305 U.S. 91 case. Though it is true that in the *Waialua Agricultural Co.* case the Supreme Court of the United States did lay down the rule that even in cases involving general law the rule that this Court should not disturb the decision of the Supreme Court of Hawaii unless there is manifest error should also be applicable, it is submitted that it is limited to cases where the general law is closely related to or partake of the nature of local law. In said *Waialua Agricultural Co. v. Christian,* supra, at pp. 108-109, the Supreme Court stated:

> "Review of its Decisions.—While the determinations made by the territorial court upon the validity of instruments executed by incompetents, the interpretation of the contract of an incompetent, and the adjustments of equities concerning improvements after cancellation of a conveyance, partake of general law, as well as of local law, we see no reason for not applying the rule as to local matters to *these circumstances* * * *" (Emphasis ours.)

Should the rule laid down in the *Waialua Agricultural Co.* case be interpreted to mean to include all general

law of whatever nature, it would in effect emasculate the jurisdiction of this Court relating to the Territory of Hawaii conferred by Congress. (28 U.S.C.A., Secs. 1293 and 1294 (5).) The general laws of fiduciary relations, tender and launching of partnership applicable in this case as contended in appellant's opening brief are not such general laws partaking of local character.

It is further respectfully submitted that though the rules of law applicable in this case be determined to be such general law partaking of a local character, the laws as determined by the Supreme Court of Hawaii to be applicable in this case are manifestly erroneous to warrant this Honorable Court to reverse the decision of the Supreme Court of Hawaii. We refer to arguments presented in appellant's opening brief relating to the fiduciary relation, the existence in fact of a partnership, the effect of the oral decision and tender and to arguments presented herein in Arguments Nos. I, II, III and IV. See also *Ah Lung v. Ah Leong* (1928) (C.C.A. 9), 27 F. (2d) 582 and *Chun Ngit Ngan v. Prudential Insurance Co.* (1925), (C.C.A. 9), 9 F. (2d) 340.

Appellant reiterates herein the fact that neither the Supreme Court of Hawaii nor the trial Court did even consider the law of fiduciary relations in reaching their decision. (Appellant's Op. Br. p. 16.) A determination of this Court, it may be said, under the above fact is not reversal by this Court of applicable law as determined by the Supreme Court of Hawaii and therefore would not contravene the rule established in the *Waialua Agricultural Co.* case.

CONCLUSION.

It is therefore submitted that the decision and order of the Supreme Court of Hawaii be reversed and an appropriate order of this Court be entered granting appellant his relief prayed for.

Dated, Honolulu, Hawaii,
June 25, 1951.

Respectfully submitted,
SHIRO KASHIWA,
Attorney for Hung Chin Ching,
Appellant.